Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1976

No. 76-1181

WILLIAM ROSENBERG and WILLIAM RODMAN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

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No.

WILLIAM ROSENBERG and WILLIAM RODMAN,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Undersigned counsel, on behalf of the petitioners, William Rosenberg and William Rodman, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case entered on November 24, 1976, affirming a judgment of the United States District Court for the Southern District of New York, convicting the petitioners of having conspired to violate Title 15, United States Code, Sections 77q, 77x, 78j(b) and 77ff of the Securities Law and Title 18, United States Code, Section 1341, the mail fraud statute, all in violation of Title 18, United States Code, Section 371.

A petition for rehearing and determination en banc was made on November 29, 1976 which petition was denied on January 27, 1977. On November 25, 1976, the petitioners made a motion to the United States Court of Appeals for the Second Circuit for continuance of bail pending determination of the petition for rehearing and determination en banc and in the event said petition was denied, pending determination of petition for a writ of certiorari to the Supreme Court of the United States. The motion for continuance of bail was granted on December 9, 1976.

OPINIONS BELOW

There was no formal opinion of the District Court, however the judgment of the District Court is set forth in Appendix A. The opinion of the Court of Appeals affirming the judgment of the District Court has not yet been reported. It is set forth in Appendix B to this petition. The decision of the Court of Appeals denying petitioners' petition for a rehearing and suggestion that it be reheard en banc has not been reported. It is reproduced in Appendix D of this petition.

JURISDICTIONAL STATEMENT

The judgment of the court below (Appendix B, *infra*) was entered on November 24, 1976. A petition for rehearing and determination en banc was filed on November 29, 1976 and was denied on January 27, 1977 (Appendix C, D, *infra*).

The grounds upon which the jurisdiction of this Court is invoked are Title 28, United States Code, Section 1254(1) and Rule 37(b) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

During the trial and on appeal the petitioners claimed that the government failed to prove that the petitioners intended and agreed to use the United States mail in furtherance of the

conspiracy alleged in the indictment. The petitioners contended that an intention and agreement to use the United States mail was a jurisdictional element of the crime alleged in the indictment and as the indictment did not allege actual use of the mail and as there was no evidence offered that the United States mail was in fact used, it was incumbent upon the government to prove that use of the mail was essential to and was required as an integral part of the alleged scheme to defraud. The government however, relying upon the case of *United States v. Feola*, 420 U.S. 671 (1975), contended that it was only necessary for the government to prove that use of the mails could reasonably have been foreseen by the defendants. The Court of Appeals in affirming the judgment of the District Court failed to address itself to the issue presented as to the standard of proof required to prove an intent and agreement to use the mail in light of the recent decision of the Supreme Court in the case of *United States v. Feola, supra,* and simply stated that: "The evidence was sufficient to show that use of the mails fell within the scope of the conspiratorial agreement." This decision of the Court of Appeals was contra to every prior decision of the Court of Appeals for the Second Circuit and was contra to every reported case in every circuit throughout the United States. The questions presented here relate to whether the verdict should have been reversed because the government failed to prove that the defendants intended and agreed to use the United States mail in furtherance of the alleged conspiracy. These questions are:

1. Whether the government had the burden of proving beyond a reasonable doubt that the defendants intended and agreed to use the United States mail.

2. Whether the standard of proof required to prove an agreement and intent to use the mail is greater than the standard applied when there has been an actual use of the mail.

3. Whether the government had the burden of proving beyond a reasonable doubt that use of the mail was essential to the success of the alleged scheme to defraud.

4. Whether the District Court erred when it refused to direct a verdict of acquittal because of the government's failure to prove beyond a reasonable doubt that use of the mail was essential to the success or execution of the alleged scheme to defraud or that it was indispensable in carrying out the alleged conspiracy.

5. Whether the court below erred when it affirmed the petitioners' judgment of conviction.

STATEMENT OF CASE

The petitioners were charged in a one count indictment with having conspired with each other to violate Title 15, United States Code, Sections 77q, 77x, 78j(b) and 78ff and Title 18, United States Code, Section 1341. The indictment did not allege any substantive crime as there was no use of the mail in furtherance of the alleged conspiracy. The government relied upon the potential use of the mail had the conspiracy been completed to its ultimate end as the basis of federal jurisdiction.

In substance, the indictment alleged that as of December 3, 1975, the petitioner William Rosenberg accumulated 150,000 shares of Franklin Properties Common Stock. That from on or about November 1, 1975, up to and including December 8, 1975, the petitioners William Rodman and William Rosenberg conspired to violate the Securities law and mail fraud law by manipulating the price of Franklin Properties Commons Stock to One ($1.00) Dollar a share and then were to pay James Kenneth Noonan, a stock broker, Fifty ($.50) cents a share cash bribe for each share of Franklin Properties Stock he sold to his customers.

The evidence in capsulated form shows that the petitioner, William Rosenberg was the trader at a John Maher Associates, Inc; a stock brokerage firm located in the City of New York. During November and early December, 1975, James Kenneth Noonan was a salesman with Leyner Dreskin & Co; a stock brokerage firm also located in New York City.

Sometime in the latter part of 1975, Noonan had a telephone conversation with Rodman during which Rodman indicated that he was involved in a stock deal and wanted to know whether Noonan would be interested in participating. Noonan said he would be but no details were discussed. On December 3, 1975, Rodman telephoned Noonan and told him the details of the deal. He told him that for every share of Franklin Properties stock Noonan had a customer buy at $1.00 he would be paid $.50 cents. The following morning Noonan reported his conversation with Rodman to Assistant United States Attorney John Lowe. Thereafter, Rodman again called Noonan and gave him the phone number of the petitioner William Rosenberg and told Noonan that Rosenberg would explain anything further Noonan wanted to know about the deal. Noonan then called Rosenberg who in substance repeated the deal as originally outlined by Rodman to Noonan.

On December 4, 1975, Noonan called Rodman from a pay phone located at the office of the United States Attorney. The conversation was recorded and was admitted into evidence as Government Exhibit No. 4. On December 5, 1975, Noonan spoke to Rosenberg from a phone located at the office of the United States Attorney. This telephone conversation was recorded and was admitted into evidence as Government Exhibit 5B.

According to the recorded telephone conversations and the testimony of Kenneth Noonan, Rodman never discussed with Noonan how many shares of Franklin Properties Stock he could sell to his customers and that in fact when Noonan first discussed the deal with Rosenberg he just spoke about selling a couple of thousand shares. Thereafter, and on December 5, 1975, during the recorded conversation (Government Exhibit No. 5B), Noonan told Rosenberg that he might be able to get an individual to purchase 30,000 shares and that the individual would probably hold the stock as a speculation. This was the total evidence of how many shares Noonan might be able to purchase and is thus the entire evidence as to the extent of the distribution contemplated between Noonan and Rosenberg.

Three witnesses testified on the question of use of the mail. Lewis Scala, the cashier of John Maher Associates testified that John Maher Associates had on occasions hand delivered confirmations for the purchase and sale of stock. Arthur Pendrick, the president of John Maher Associates testified that sometimes customers would come up to the firm and pick up their confirmations by hand. He also testified that use of the mail was not essential to consummate the sale or purchase of securities. Noonan testified that he *believed* that Leyner, Dreskin only sent confirmations by mail (Italics supplied). He also testified that he never told Rodman or Rosenberg of Leyner, Dreskin's custom or practice of mailing confirmations.

REASONS FOR GRANTING THE WRIT

Fraud is not a federal crime unless it is coupled with some proscribed act which confers federal jurisdiction. In the case at bar, at the election of the government, the proscribed act relied upon was use of the mail. As the proscribed act did not occur, the government had the burden of proving beyond a reasonable doubt that the petitioners intended and agreed to use the mail. *Guardalibini v. United States,* 128 F. 2d 984 (5th Cir. 1942); *Mazurósky v. United States,* 100 F. 2d 958 (9th Cir. 1939); *Burns v. United States,* 279 F. 982 (10th Cir. 1922); *Morris v. United States,* 7 F. 2d 785 (8th Cir. 1925).

In mail fraud cases, it is the mailing of the count letter or other document that constitutes the basis of federal jurisdiction and proof of mailing is therefore, an essential element of the crime of mail fraud. The government has the burden in such a case to prove mailing beyond a reasonable doubt with competent evidence. *United States v. Wolfson,* 322 F. Supp. 798 (D.C. Del. 1971); *Bolen v. United States,* 303 F. 2d 870 (9th Cir. 1962); *Northcraft v. United States,* 271 F. 2d 184 (8th Cir. 1959); *United States v. Berg,* 144 F. 2d 173 (3rd Cir. 1944); *Whealton v. United States,* 113 F. 2d 710 (3rd Cir. 1940); *United States v. Herzig,* 26 F. 2d 487 (D.C. N.Y. 1928); *United States v. Maza,*

414 U.S. 395 (1974); *Kann v. United States,* 323 U.S. 88, 94 (1944); *United States v. Goldenberg,* 455 F. 2d 479 (9th Cir. 1972); *United States v. Baker,* 50 F. 2d 122 (2d Cir. 1931); *Rosenberg v. United States,* 120 F. 2d 935 (10th Cir. 1941); *United States v. Browne,* 225 F. 2d 751 (7th Cir. 1955); *United States v. Jones,* 174 F. 2d 746 (7th Cir. 1949); *United States v. Provoo,* 215 F. 2d 531 (2d Cir. 1954).

However, the petitioners were not charged with mail fraud but with the crime of conspiracy to commit mail and securities fraud. The substantive count of mail fraud must be distinguished from a charge of conspiracy which, being an agreement, requires proof of an intended use of the mails. *Banister v. United States,* 379 F. 2d 750 (5th Cir. 1967). The parties must agree upon all elements of the crime including the use of the mails. *United States v. Cohen,* 145 F. 2d 82 (2d Cir. 1944); *Farmer v. United States,* 223 F. 903 (2d Cir. 1915); *Mazurosky v. United States, supra; Guardalibini v. United States, supra; Blue v. United States,* 138 F. 2d 351 (6th Cir. 1943); *Banister v. United States, supra, Schwartzberg v. United States,* 241 F. 348 (2d Cir. 1917); *Raffe v. United States,* 65 S. Ct. 553, 323 U.S. 799 (1944).

On a charge of conspiracy to violate the mail fraud statute, the government must sustain a heavier burden of proof as to the intent of the conspirators to defraud by the use of the mails then the burden the government must sustain in order to prove the substantive charge of mail fraud. *Blue v. United States, supra; Clark v. United States,* 64 S. Ct. 1046, 322 U.S. 736 (1943); *Pardee v. United States,* 64 S. Ct. 1046, 322 U.S. 737 (1943); *Farmer v. United States, supra; Morris v. United States, supra.*

The test to determine the sufficiency of evidence with regard to proof of an intent and agreement to use the mail was set forth in *Farmer v. United States, supra,* where the court stated:

> "Usually when the scheme is unfolded it is apparent that it *could not be carried out without*

> *the use of the mails* and a jury is therefore warranted, without further proof, in drawing the inference that those who devised the scheme intended to use the mails." (Italics supplied.)

The issue as presented in the *Farmer* case is whether the scheme could have been carried out without the use of the mails. There was no evidence offered by the government to show that the nature of the scheme was such that it could not be carried out without the use of the mails.

In the case of *Mansfield v. United States,* 155 F. 2d 952 (5th Cir. 1946), the scheme involved was the selling of Texas land to residents of California. Deeds had to be sent through the mail and recorded in Texas and then mailed by the recording clerk in Texas back to California. The court held that the defendants had the requisite specific intent to use the mail *as the scheme could not have been carried out without the use of the mails.* (Italics supplied.) The court stated:

> "It is the rule that where the accomplishment of the conspiracy contemplates the use of the mails *and such is essential to the execution of the scheme,* intent on the part of the conspirators to use the mails may be inferred." (Italics supplied.)

The court went on to state that the use of the mails was indispensable in carrying out the scheme. See also *Blue v. United States, supra.*

In the case of *Banister v. United States, supra,* the nature of the scheme was such that the defendants knew that certain fraudulent insurance claims had to be filled out in the State of Florida, filed with the local agent of the insurance company and mailed by the local agent in Florida to the home office of the insurance company in New York. The court held that the defendants had the requisite specific intent to use the mail as the use of the mail "would be *required as an integral part of the scheme.*" (Italics supplied.)

In the case of *Schwartzberg v. United States, supra,* the mail was extensively used in the execution of the fraud. The court reversed the defendant's conviction on the conspiracy count citing the *Farmer* case. Although the mails were used extensively in the execution of the scheme, its use was not an integral part of the scheme to defraud. The court held that the intent which was held necessary in the *Farmer* case was not proven by direct evidence and could not be inferred beyond a reasonable doubt. It is therefore evident that the use of the mail in the execution of the scheme to defraud does not by itself create an inference that the defendants agreed and intended to use the mail.

In the case of *United States v. MacNamara,* 91 F. 2d 986 (2d Cir. 1937), the court stated that the offense of conspiracy to use the mails to defraud consists of a scheme devised or intended to be devised *and use* of the mails in execution or attempted execution thereof. (Italics supplied.) From the holding in the *MacNamara* case, it would follow that there cannot be a conviction for conspiracy to commit mail fraud without actual use of the mail in furtherance of the scheme and artifice to defraud. The petitioners do not ask this Court to go that far.

From the foregoing cases it is manifest that in cases where the mail has not been used, before it can be inferred beyond a reasonable doubt that the petitioners intended and agreed to use the mail in furtherance of the scheme to defraud, the government must introduce evidence showing that the scheme could not be carried out without the use of the mails or that the use of the mails was essential or indispensable to the execution of the scheme. No such evidence was introduced by the government. On the contrary, the evidence clearly showed that the scheme could have been carried out without the use of the mail and that use of the mail was not essential or indispensable to effectuating the scheme nor was it an integral part of the scheme as defined in the case of *Farmer v. United States, supra,* and its progeny.

The Court of Appeals in the case at bar, completely ignored the case of *Farmer v. United States, supra,* and its progeny and seems to have adopted the argument of the government that since the holding of the Supreme Court in the case of *United States v. Feola, supra,* the government did not have the burden of proving that use of the mail was essential to the scheme but merely had to prove that the use of the mail could reasonably have been foreseen by the defendants. This interpretation of the holding in *United States v. Feola, supra,* is erroneous and would confer federal jurisdiction in every fraud case except those perpetrated under such circumstances which would preclude the use of the mail, telephone or other instrumentalities of interstate commerce. Such was not the intent of the legislature in conferring federal jurisdiction.

The Court of Appeals has enlarged upon the holding of the Supreme Court in *United States v. Feola, supra.* The proscribed act in the *Feola* case is to assault a federal employee. The Court held that the substantive statute did not require a specific intent to assault a federal officer and no greater scienter requirement can be engrafted upon the conspiracy offense which is merely an agreement to commit the act proscribed by *Section 111 of Title 18, United States Code.* To satisfy the substantive statute all that was required was proof of intent to assault. As there was no requirement that the assailant know that his victim is a federal officer, there is nothing on the face of the conspiracy statute that would seem to require that those agreeing to the assault have a greater degree of knowledge. However, the Court said that if there is an unfulfilled agreement to assault, the intended victim must be specifically identified, and if the identified individual is in fact a federal officer, the agreement may be fairly characterized as one calling for an assault upon a federal officer even though the parties were unaware of the victim's actual identity. Thus, the holding in the *Feola* case is that the substantive crime is complete if a federal agent is assaulted even though the assailant did not know the victim was a federal agent. The conspiracy is complete if the parties agree to assault

an individual who, upon identification, is shown to be a federal agent even if the conspirators did not know he was a federal agent.

It does not follow from the *Feola* decision that in a case of conspiracy to commit mail fraud it should only be necessary for the government to prove that use of the mails could reasonably have been foreseen by the defendants—the same standard applicable to a substantive offense. The gist of the offense in the *Feola* case was the assault. To sustain a conspiracy conviction there must be an agreement to assault and sufficient identification to show that the intended victim was a federal agent so that the agreement may be fairly characterized as one calling for an assault upon a federal agent. In mail fraud cases the gist of the offense is the use of the mails. The posting of a "count letter" is the corpus deliciti. *United States v. Cohen, supra; Weiss v. United States,* 122 F. 2d 675 (5th Cir. 1941). The devising of a scheme to obtain money by means of fraud or false pretenses is not a crime under the laws of the United States, and becomes a crime only in the event that the United States mails are used in carrying out the scheme. *Baker v. United States,* 115 F. 2d 533 (8th Cir. 1940). In the *Feola* case to sustain a conspiracy conviction absent an actual assault the agreement must be fairly characterized as one calling for an assault upon a federal agent. In mail fraud cases in order to sustain a conspiracy conviction absent an actual mailing, the agreement must call for use of the mails. The test applied in the Second Circuit to determine whether there was an agreement to use the mail is not whether the use of the mails could reasonably have been foreseen by the defendants. This standard is only applicable to the substantive offense. The test to be applied is whether the scheme could have been carried out without the use of the mails or whether the use of the mail was essential to the execution of the scheme. If the use of the mail was essential to the execution of the scheme and the scheme could not have been carried out without the use of the mail, an agreement and intent to use the mail may be inferred. *Farmer v. United States, supra.* This

standard of proof was not modified by the case of *United States v. Feola, supra,* which did not address itself to the standard of proof to be applied in determining whether an agreement may fairly be characterized as one calling for use of the United States mail in order to sustain a conspiracy conviction lacking a substantive offense of actual use of the mail or evidence of actual use of the mail.

In order to affirm the conviction of the petitioners the Court of Appeals completely ignored established precedent not only in the Second Circuit but in every circuit throughout the United States and did so without so much as even attempting to distinguish said precedent or deciding that said precedent is no longer law in the Second Circuit. The decision of the Court of Appeals has created uncertainty in an area of the law which had heretofore been clear and unambiguous. It has resulted in the affirmance of a judgment of the District Court upon facts never before held sufficient to warrant a conviction of a defendant for the crime of conspiracy to commit mail fraud. If permitted to stand, the decision of the Court of Appeals would appear to apply to these petitioners alone because of some fact not reflected in the record.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

s/ Morton Berger
Attorney for Petitioners

APPENDIX A — JUDGMENTS OF UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

WILLIAM RODMAN

76 Cr. 43

In the presence of the attorney for the government the defendant appeared in person on this date — May 28, 1976

Counsel
With Counsel — Morton Berger

Plea
There being a finding/verdict of — Guilty

Finding & Judgment
Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully and knowingly, did combine, conspire, confederate and agree together and with each other to commit violations of the laws of the United States. (Title 18, United States Code, Section 371)

Sentence or
Probation Order
The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative

Appendix A

for imprisonment for a period of FIFTEEN (15) MONTHS execution of all but FOUR (4) MONTHS is suspended. Defendant is placed on probation for a period of THREE (3) YEARS plus ELEVEN (11) MONTHS. (Total probation for 47 months), to follow service of sentence, subject to the standing probation order of this court.

Defendant is continued R.O.R. pending appeal.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Certified As A
True Copy On

This Date — 5-28-76

By James J. Matasi
Deputy

U.S. District Judge
s/ Lee P. Gagliardi
LEE P. GAGLIARDI
(date illegible)

Appendix A

UNITED STATES DISTRICT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

WILLIAM ROSENBERG

76 Cr. 43

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Counsel
With Counsel — Louis Aidala

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Appendix A

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By James J. Matasi
Deputy

U.S. District Judge
s/ Lee P. Gagliardi
LEE P. GAGLIARDI
(date illegible)

APPENDIX B — OPINION OF UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS
For The
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of November, one thousand nine hundred and seventy-six.

Present:

HONORABLE WILFRED FEINBERG

HONORABLE MURRAY I. GURFEIN

HONORABLE ELLSWORTH A. VAN GRAAFEILAND

Circuit Judges,

UNITED STATES OF AMERICA,

Appellee,

-against-

WILLIAM RODMAN and WILLIAM ROSENBERG,

Defendants-Appellants.

Nos. 76-1267
76-1268

Appeal from the United States District Court for the Southern District of New York.

Appendix B

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed. Appellants were convicted for conspiracy to violate the mail fraud statute and the federal securities laws. Arguing insufficiency of the evidence, appellants state that "To establish federal jurisdiction, the agreement must be fairly characterized as one calling for use of the mail to accomplish its goals." (Appellants' brief at 22) However, the evidence was sufficient to show that use of the mails fell within the scope of the conspiratorial agreement. The Government also satisfactorily proved defendant Rodman's participation in the conspiracy. Even if he did not have a financial stake in the securities deal, the evidence indicated that he was an architect of the plan. Appellants' assertion that testimony from Rodman's wife should not have been excluded is without merit because the defendants never informed the trial judge of the substance of the excluded evidence; Rule 103(a)(2), Fed. Rules of Evidence, because the evidence was apparently hearsay and because, in any event, the rulings were within the trial judge's discretion. Appellants' other assertions of reversible error are equally without merit.

s/ Wilfred Feinberg

s/ Murray I. Gurfein

s/ Ellsworth A. Van Graafeiland

APPENDIX C — PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

Second Circuit

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of January, one thousand nine hundred and seventy-seven.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM RODMAN AND WILLIAM ROSENBERG,

Defendants-Appellants.

76-1267

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellants, William Rodman and William Rosenberg, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/ Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge

APPENDIX D — ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of January, one thousand nine hundred and seventy-seven.

Present:

HON. WILFRED FEINBERG

HON. MURRAY I. GURFEIN

HON. ELLSWORTH A. VANGRAAFEILAND

Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM RODMAN and WILLIAM ROSENBERG,
Defendants-Appellants.

76-1267

A petition for a rehearing having been filed herein by counsel for the appellants, William Rodman and William Rosenberg,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk